

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

OTIS MICHAEL THOMAS,

Plaintiff,

v.

L. JOHNSON, et al.,

Defendants.

No. 2:21-cv-01657-CKD P

ORDER

Plaintiff is a state prisoner proceeding without counsel. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983, and is proceeding in forma pauperis. This proceeding was referred to this court pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 302. Plaintiff's second amended complaint is now before the court.

**I. Screening Requirement**

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2).

A claim is legally frivolous when it lacks an arguable basis either in law or in fact.

Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th

1 Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an  
 2 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,  
 3 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully  
 4 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th  
 5 Cir. 1989); Franklin, 745 F.2d at 1227.

6 A complaint, or portion thereof, should only be dismissed for failure to state a claim upon  
 7 which relief may be granted if it appears beyond doubt that plaintiff can prove no set of facts in  
 8 support of the claim or claims that would entitle him to relief. Hishon v. King & Spalding, 467  
 9 U.S. 69, 73 (1984) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); Palmer v. Roosevelt  
 10 Lake Log Owners Ass'n, 651 F.2d 1289, 1294 (9th Cir. 1981). In reviewing a complaint under  
 11 this standard, the court must accept as true the allegations of the complaint in question, Hosp.  
 12 Bldg. Co. v. Rex Hosp. Trustees, 425 U.S. 738, 740 (1976), construe the pleading in the light  
 13 most favorable to the plaintiff, and resolve all doubts in the plaintiff's favor, Jenkins v.  
 14 McKeithen, 395 U.S. 411, 421 (1969).

## 15 II. Procedural History

16 On October 13, 2022, the court screened plaintiff's first amended complaint and gave him  
 17 the option of proceeding on certain claims against several defendants, or of filing a second  
 18 amended complaint to attempt to cure the defects with the remaining claims and defendants. ECF  
 19 No. 12. Plaintiff elected to file a second amended complaint rather than proceed on the claims  
 20 found cognizable in the court's screening order. ECF No. 14. On November 28, 2022, plaintiff  
 21 filed a second amended complaint that is nearly identical to the first amended complaint. ECF  
 22 No. 17.

## 23 III. Analysis

24 Rather than fix the deficiencies identified in the court's prior screening order, plaintiff  
 25 simply refiled a nearly identical copy of his first amended complaint against twenty-two  
 26 defendants. Based on his failure to comply with the court's screening order, the second amended  
 27 complaint must be dismissed. The court will, however, grant plaintiff leave to file a third  
 28 amended complaint, but it must be **limited to no more than 25 pages in length including**

1 **exhibits.**

2 If plaintiff chooses to file a third amended complaint, plaintiff must demonstrate how the  
3 conditions complained of have resulted in a deprivation of plaintiff's federal constitutional or  
4 statutory rights. See Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). Also, the third amended  
5 complaint must allege in specific terms how each named defendant is involved. There can be no  
6 liability under 42 U.S.C. § 1983 unless there is some affirmative link or connection between a  
7 defendant's actions and the claimed deprivation. Rizzo v. Goode, 423 U.S. 362 (1976); May v.  
8 Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir.  
9 1978). Furthermore, vague and conclusory allegations of official participation in civil rights  
10 violations are not sufficient. Ivey v. Bd. of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

11 In addition, plaintiff is informed that the court cannot refer to a prior pleading in order to  
12 make plaintiff's second amended complaint complete. Local Rule 220 requires that an amended  
13 complaint be complete in itself without reference to any prior pleading. This is because, as a  
14 general rule, an amended complaint supersedes the original complaint. See Loux v. Rhay, 375  
15 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files a third amended complaint, the original pleading  
16 no longer serves any function in the case. Therefore, in a third amended complaint, as in an  
17 original complaint, each claim and the involvement of each defendant must be sufficiently  
18 alleged.

#### 19 **IV. Plain Language Summary for Pro Se Party**

20 The following information is meant to explain this order in plain English and is not  
21 intended as legal advice.

22 The court is dismissing your second amended complaint because it is identical to the first  
23 amended complaint that the court previously screened and gave you the option to proceed only  
24 against certain defendants. **You are being given one last chance to file a third amended**  
25 **complaint that is limited to no more than 25 pages in length including the exhibits.**

26 Although you are not required to do so, you may file a third amended complaint within 30  
27 days from the date of this order. If you choose to file an amended complaint, pay particular  
28 attention to the legal standards identified in this order which may apply to your claims.

1 In accordance with the above, IT IS HEREBY ORDERED that:

2 1. Plaintiff's second amended complaint is dismissed for failure to comply with a court  
3 order.

4 2. Plaintiff is granted thirty days from the date of service of this order to file a third  
5 amended complaint limited to **no more than 25 pages including exhibits**. Any amended  
6 complaint must comply with the requirements of the Civil Rights Act, the Federal Rules of Civil  
7 Procedure, and the Local Rules of Practice.

8 **3. Plaintiff is warned that his failure to file a third amended complaint in**  
9 **accordance with this order, including the page limitation, will result in a recommendation**  
10 **that this action be dismissed for failure to comply with a court order.**

11 Dated: May 23, 2023



12 CAROLYN K. DELANEY  
13 UNITED STATES MAGISTRATE JUDGE  
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